



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.782 OF 2015

BANKING, INSURANCE & FINANCE UNION (KENYA)CLAIMANT

VERSUS

ARDHI SACCO SOCIETY LIMITEDRESPONDENT

JUDGEMENT

Issue in dispute - The effective date of the Collective Bargaining Agreement (CBA)

1. This is an economic dispute with the issue in dispute not agreed being the effective date of the CBA.
2. The Claimant is a registered trade union under the Labour Relations Act to represent workers in the money market section including Banks, insurance companies, financial institutions, building societies, financial institutions, savings and credit societies and other related institutions. The Respondent is a registered Savings and Credit Co-operative Society under the Society Act and the Co-operative Act.
3. The parties have a Recognition Agreement signed on 23rd January 2013 and the Claimant forwarded the Collective Bargaining Agreement (CBA) to the Respondent on 2nd May 2013. Parties were not agreed to the CBA terms and a dispute was reported with the Minister and a conciliator appointed on 8th August 2013. Issues were agreed save for 3 as set out above.
4. The matter was filed in court on 11th May 2015, parties proceeded with negotiations and two (2) issues were agreed upon save for one (1), the effective date of the CBA – date of commencement. Each party has filed written submissions on the 1 pending issue.
5. The Claimant claim is that they recruited unionisable employees of the Respondent from February 2005 and a recognition agreement was signed on 23rd January 2013. The Claimant gave the CBA to the Respondent on 2nd May 2013 and proposed the effective date to be 1st March 2013. The Respondent counter-offered with proposal to have 1st September 2013 as the effective date. The CBA was to cover 3 years. Despite the respondent's response of proposed effective date, they have refused to settle the matter. That this amounts to bad faith.
6. The Claimant is seeking an award of General wage increment of 20% for year I, 30% for year 2 and 20% for year 3.

Defence

7. In defence, the respondent's case is that there is no CBA in force between the parties and the draft has no effective date. The CBA could not be signed until all outstanding issues had been agreed upon. The

CBA as an agreement does not bind the Respondent unless signed in agreement.

Submissions

8. The Claimant submit that on the outstanding issue not agreement upon, the effective date of the CBA, the parties have a Recognition Agreement dated 23rd January 2013. A CBA was submitted to the Respondent way back on 2nd may 2013. The Respondent proposed the effective date as 1st September 2013 but has refused to implement the same. All issues have therefore been settled save for salary arrears on one million. In **Kenya Union of Commercial Food and Allied Workers versus M/S Insta Products (EPZ) Limited, Cause No.333 of 2010**, the court awarded effective date to be 1st June 2009 as opposed to the respondent's submission that it be one day after agreement and or judgement. That in **Kenya Chemical and Allied Workers Union versus Leather Life EPZ limited, Cause No.816 of 2012**, the court awarded the effective date to be 1st April 2011 as opposed to the respondent's submission that is be one day after the agreement or judgement.

9. That CBA have retroactive effect as negotiations cannot be concluded within a set period. The offer by the Respondent for 1st September 2013 is approved by the claimant. The Respondent is estopped from going back on the effective date. The court should find the applicable effective dates are 1st September 2013 to 31st August 2015 and the Respondent be directed to sign the CBA.

10. The Respondent submit that parties herein have been negotiating the various items in the CBA but none has been signed as one (1) issue is not agreed – the effective date. This is the first CBA between the parties. That the negotiations have taken a long time and the Respondent cannot afford to pay in arrears. The Respondent budgets are approved by the Annual General Meeting which is held in April each year, 9 months before implementation. The budget for 20156 is already out without factoring the increments as negotiations were ongoing. To backdate the CBA to 2013 when negotiations started will put the Respondent in arrears and this cannot be passed on to members as the AGM is since past. The Claimant proposals cannot be sustained by the Respondent budget as this will have an annual effect;

2014 Kshs.2, 527,518.00;

2015 Kshs.360, 908.00; and

2016 Kshs.242, 193.00.

11. The Respondent reviewed its salaries in 2015 and 2016 by 10% and other allowances despite not signing the CBA. The core business of the Respondent tis savings and credit and staff costs at 2013 and 2014 were 17% and 193% of total income respectively and to allow the 1st of September 2013 as the effective date will push the expenses costs by more than 50% of the gross income against the recommended 30%. To allow the CBA operate as proposed by the Claimant will negatively impact on the Respondent with possible close down.

12. The Respondent also propose that the CBA should take effect on 1st September 2017 once the increments have been factored in the respondent's budget. The Respondent has acted in good faith by agreeing to all other issues save for the effective date. The Claimant proposal of having 1st January 2015 is not possible at the Respondent is regulated by strict budgetary allocations. The Respondent seek the court to adopt the date of 1st September 2017 as the effective date.

Determination

13. The foundational basis for CBA is the Labour Relations Act read together with article 41 of the constitution on fair labour practices in employment and labour relations. Section 57 (1) and (2) provides;

57(1) An employer, group of employers or an employers' organisation that has recognised a trade

union in accordance with the provisions of this Part shall conclude a collective agreement with the recognised trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.

(2) For the purpose of conducting negotiations under subsection (1), an employer shall disclose to a trade union all relevant information that will allow the trade union to effectively negotiate on behalf of employees. [Emphasis added].

14. The law contemplates parties to enter into negotiations so as to conclude a CBA and for an effective process of negotiations, the employer is required to disclose to the union all relevant information that will allow the union to effectively negotiate on behalf of its members in the employment of the employer.

15. Parties admit that the period under negotiations relate to CBA submitted by the Claimant on 2nd May 2013 and the counter proposal of the Respondent seeking date of implementation as 1st September 2013. The subject CBA was to cover 3 years – 1st March 2013 to 28th February 2015. Parties have since engaged in negotiations and the subject period has since lapsed.

16. It is common cause that all items have now been settled as set out under the CBA covering 3 years, 1st March 2013 and 28th February 2015. The Respondent in submissions has set out the financial implications of implementing the subject CBA that the costs would be;

2014 at kshs.2, 527,518.00;

2015 at kshs.360, 908.00; and

2016 at Kshs.242, 193.00.

17. As such, the Respondent is aware and has been aware of the material implication of the subject CBA and the proposal made to have the same effected from 1st September 2013, is not denied, and was made with the knowledge of the set out financial implications of implementing the same.

18. Therefore, the Respondent has costed the subject CBA but delayed the implementation of the same and now propose to have the effective date from 1st September 2017. However, the subject CBA relate to a particular period and even where the Respondent has made salary reviews for its employees upwards by 10% for 2014 and 2015, such should have been addressed within the CBA to avoid a conflict and incurring of unnecessary costs as to work outside the Recognition Agreement with the Claimant is an unfair labour practice. The conclusion of the CBA has stalled due to the issue of effective date not being addressed. Within the subject timeframe, 2013 to 2015, the Respondent has gone out and on their own to increase salaries. As such, I find no good faith on the part of the Respondent to negotiate the subject CBA to a conclusion. The materials now submitted in court in submissions should have been made available to the Claimant during the negotiations.

19. In **Teachers Service Commission versus Kenya National Union of Teacher & Others, Petition No.3 of 2015**, the court in addressing the issue of effective date for a CBA under negotiations went back by 5 years to cover the duration of the CBA in its entirety. To therefore stall negotiations so as to avoid meeting the terms of the CBA is not a fair labour practice. Such can only work against the party in procrastination. Where the issue is not resolved upon negotiations, the court must give context to the period subject to the same. In this regard, the Claimant conceded to the offer by the Respondent as being 1st September 2013 to 31st August 2016 – a period of 3 years.

20. I therefore find no basis with regard to the respondent's submissions. They have through the years been aware of the subject CBA and its financial implications and noting the recognition agreement in place, the annual financial projections should have factored the consequence of the same. Indeed the court in **Kenya Airways Limited versus Kenya Airlines Pilots Associations [2013] eKLR** held that delayed negotiations over an employee's benefit is not a bar for claiming the same. Indeed an employee can

exercise the right to seek a work benefit to cover a period retroactively. In **Kenya Chemical and Allied Workers Union versus Leather Life EPZ Limited [2014] eKLR**, the court held that the employer who paid employees below the minimum wage has a duty to pay the balances due for the subject period.

21. In this case therefore, noting the increases the Respondent has made in 2014 and 2015 at 10% such shall be put into account in the context of the subject CBA. I find the applicable period and effective dates for the CBA between the parties is 1st of September 2013 to 31st August 2016. As the Respondent has not made effort to challenge the claim with regard to the percentages set out in the Memorandum of Claim at 20%; 30% and 20% for year 1, 2 and 3 putting into account the increments of 10% in the 2 years past, the period the matter was under negotiations, the award to general wage for the period 1st September 2013 to 31st August 2016 shall be 0% for the first year; 20% for the second year; and 10% for the third year. New increments can be factored in future CBA negotiations.

The Court awards as follows;

- a) The effective date shall be 1st September 2013 to 31st August 2016 a period of 3 years;**
- b) The General wage for the period of the CBA shall be at 0% first year; 20% second year; and 10% for third year;**
- c) As parties are engaged in a long term recognition agreement, no orders to costs.**

Orders accordingly.

Delivered in open court at Nairobi this 29th day of September 2016.

M. MBARU

JUDGE

In the presence of:

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